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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1973

CITY OF NORTH LAS VEGAS,

Petitioner,

vs.

CLARK COUNTY and
SUNRISE MANOR PROTECTIVE ASSOCIATION,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

ROY A. WOOFTER
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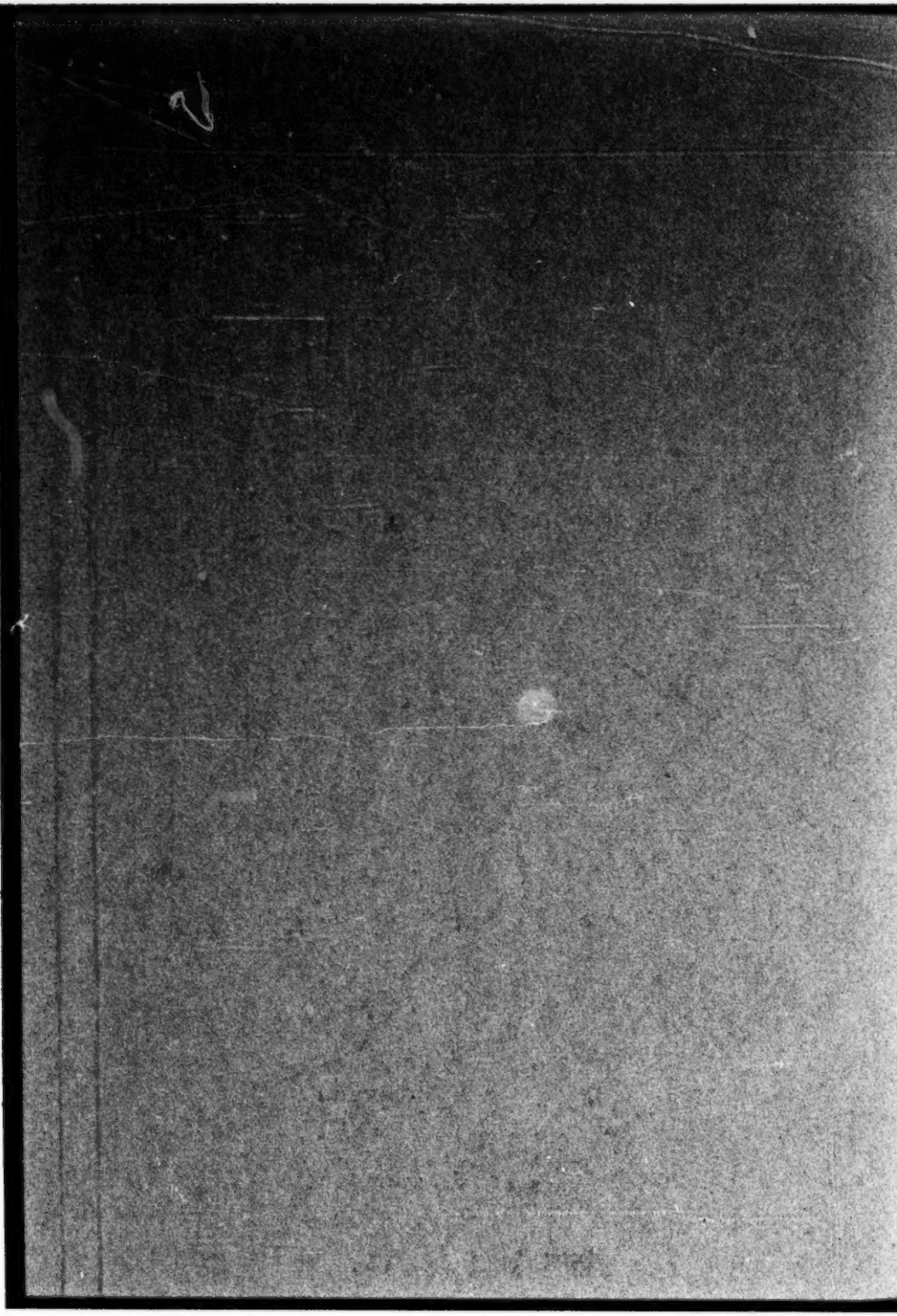
Clark County

SEPTEMBER 12, 1973



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In The
SUPREME COURT OF THE UNITED STATES
****
October Term, 1973
No. 73-293
****
CITY OF NORTH LAS VEGAS,
Petitioner,

vs.

CLARK COUNTY and
SUNRISE MANOR PROTECTIVE ASSOCIATION, et al.,
Respondents.
****
On Petition for Writ of Ceriorari to
the Supreme Court of Nevada
****
BRIEF FOR RESPONDENTS IN OPPOSITION
****

OPINIONS BELOW

Respondent, Clark County, adopts Petitioner's statement relative to the Opinions Below.

JURISDICTION

Respondent contends that there is no jurisdiction of this Court under 28 U.S.C. Section 1257 (3).

The Respondent, Clark County, contends that no federal questions were at any time raised in the proceedings below, also no federal questions were briefed in the proceed-

ings below, also no federal questions were briefed in the proceedings below and federal questions were not necessary to the Opinion as decided by the Trial Court.

Federal Supreme Court's dismissal of appeal from state court, for want of substantial federal question, amounts to affirmance on merits. Port Authority Bondholders Protective Committee v. Port of New York Authority, D.C. N.Y. 1967, 270 F.Supp. 947, affirmed 387 F.2d 259.

Federal Supreme Court decision dismissing appeal for want of substantial federal question was a decision on merits. Wyley v Warden, Md. Penitentiary, D.C. Md. 1966, 254 F.Supp. 727, affirmed 372 F.2d 742, certiorari denied 88 S. Ct. 121, 389 U.S. 863, 19 L.Ed.2d 131, rehearing denied 88 S.Ct. 484, 389 U.S. 997, 19 L.Ed. 2d 500.

Issue whether federal question was sufficiently and properly raised in state courts is itself ultimately a federal question, as to which Supreme Court is not bound by decision of state courts. Street v. New York, N.Y. 1969, 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed.2d. 572, on remand 302 N.Y.S. 2d 848, 24 N.Y.2d 1026, 250 N.E. 250.

Petitioner could not raise, for time on Writ of Certiorari, contention of alleged unconstitutional application of N.J.S.A. 24:4-37(b), pertaining to disposition of juvenile offenders, where state courts had had no opportunity to pass upon it. Monks v. New Jersey, N.J. 1970, 90 S.Ct. 1563, 398 U.S. 71, 26 L.Ed.2d 54.

When highest state court has failed to pass upon federal question, it willbe assumed that omission was due to want of proper presentation in state courts, unless aggrieved party in United States Supreme Court can affirmatively show the contrary. Street v. New York, N.Y. 1969, 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed.2d 572 on remand 30 N.Y.S . 2d 848, 24 N.Y.2d 1026, 250 N.E.2d 250.

If issue was not presented to state courts in such manner that it was necessarily decided by highest state court when it affirmed conviction, United States Supreme Court would have no power to consider issue. Id.

QUESTIONS PRESENTED

Respondent will note that no federal question was involved in the proceedings below and contends that the attempts of the Petition to inject a federal question for the first time on its Petition for Writ of Certiorari is impossible; however, for the convenience of the Court, the Respondent will use the form of the Questions Presented.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent adopts Petitioner's wording as contained in their Petition.

STATEMENT OF CASES

Respondent will adopt the Petitioner's wording as to the Statement of the Cases.

NO REASONS EXIST FOR ALLOWANCE OF WRIT

The Respondent calls the Court's attention to the fact that the opinion of the Nevada Supreme Court merely held that in every attempted annexation that there had to be compliance to NRS 268.582; that a municipality which had started an annexation, could not take a larger annexation, and, when it failed, to seek to annex only a part thereof. The smaller area annexation was, in fact and in law, a new annexation wherein there had to be compliance from the commencement with NRS 268.252. The Supreme Court went on to find NRS 268.582 as the jurisdictional requirement for any annexation.

It is the Respondent's contention that there is not even a hint of a federal question.

It is further noted that there is not a single case cited which involved an annexation problem and that the Petitioner cited only generalized rules, each devoid of particular fact application involved.

It is the position of the Respondent that the Supreme Court of the State of Nevada was correct when it found N.R.S. 266.582 to be a jurisdictional requirement for any annexations. Further, to say that a Court which holds that a section of a Statute must be complied with and to contend that this amounted to a violation of a constitutional privilege is sheer nonsense.

The Supreme Court will review a decision

of a state court only where it affirmatively appears from record that a federal question was presented to the highest state court having jurisdiction and that its decision on the federal question was necessary to the determination of the cause, and where decision might have been either on a state ground or on a federal ground and state ground is sufficient to sustain judgment, the Supreme Court will not undertake to review it, but if the independent state ground was not a substantial or sufficient one, it will be presumed that the state court based its judgment on the federal question, and the Supreme Court will then take jurisdiction. Durley v Mayo, Fla. 1956, 76 S.Ct. 806, 351 U.S. 277, 100 L.Ed. 1178, rehearing denied 77 S.Ct. 22, 352 U.S. 859, 1 L.Ed.2d 69.

The United States Supreme Court will not review judgments of state courts that rest on adequate independent state grounds. Dixon v. Duffy, Cal. 1951, 72 S.Ct. 10, 342 U.S. 33, 96 L.Ed. 46.

The Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented for decision to highest court of state having jurisdiction, but that its decision of federal question was necessary to determination of the cause, that federal question was actually decided, or that judgment was actually decided, or that judgment as rendered could not have been given without deciding it. Southwestern Bell Telephone Co. v State of Oklahoma, Okl. 1938, 58 S.Ct. 528, 303

U.S. 206, 82 L.Ed. 751. See also, People of State of New York ex rel. Consolidated Water Co. of Utica v Maltbie, N.Y. 1938, 58 S.Ct. 506, 303 U.S. 158, 82 L.Ed. 724.

No substantial federal question was presented on appeal from Ohio Supreme Court's dismissal, for want of debatable constitutional question, of appeal from judgment denying injunction against expenditure of public funds for appropriation of property for urban renewal project. Grisanti v City of Cleveland, Ohio 1962, 83 S.Ct. 111, 371 U.S. 68, 9 L.Ed. 2d 119.

Any deliberate choice by defense counsel to delay objection to tainted evidence either to discredit witness offering evidence or to invite error will amount to a waiver binding on defendant and preclude him from decision on merits of federal claim with respect to admission of tainted evidence, either in state or federal court. Henry v. State of Miss., Miss. 1965, 85 S.Ct. 564, 379 U.S. 443, 13 L.Ed.2d 408, rehearing denied 85 S. Ct. 878, 380 U.S. 926, 13 L.Ed.2d 813, on remand 174, So.2d 348, motion denied 85 S.Ct. 1528, 381 U.S. 908, 14 L.Ed.2d 431.

Principle that Supreme Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions, applies not only in cases involving state substantive grounds but also in cases involving procedural grounds. Id.

Doctrine that Supreme Court will decline

to review state court judgments which rest on independent and adequate state grounds is necessary to avoid advisory opinions. Id.

Where an agreed case presented no issue as to the validity of a statute, but simply the question of its construction, and that question only was considered by the state court, the Supreme Court of the United States cannot take jurisdiction because, as thus construed, the statute impaired the obligation of the contract not mentioned in the agreed case, or because it denied the equal protection of the laws in contravention of the Constitution of the United States. Louisville, etc., R.Co. v Louisville, Ky. 1897, 17 S.Ct. 725, 166 U.S. 709, 41 L.Ed. 1173.

The court acts only on the judgment and only such questions as either have been or ought to have been passed on by the state courts in the regular course of its proceedings can be considered. Fashmacht v. Frank, La. 1874, 90 U.S. 416, 23 Wall. 416, 23 L.Ed. 81.

The Supreme Court will not decide constitutional issues which are hypothetical or in advance of necessity for deciding them, or without reference to the manner in which statute whose constitutional validity is drawn in question, is to be applied. Asbury Hospital v Cass County, N.D. 1945, 66 S.Ct. 61, 326 U.S. 207, 90 L.Ed. 6.

Averment by owners of property on a public alley that an ordinance permitting the closing of it unconstutionally impairs the obligation of a contract with the dedicator does not present a substantial federal question. Bowe v.

Scott, Va. 1914, 34 S.Ct. 769, 233 U.S. 658, 58 L.Ed. 1141.

Principle that Supreme Court will decline to review court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions, applies not only in cases involving procedural grounds. Henry v. State of Miss., Miss. 1965, 85 S.Ct. 564, 379 U.S. 443, 13 L.Ed.2d 408, rehearing denied 85 S. Ct. 878, 380 U.S. 926, 13 L.Ed.2d 813, on remand 174 So.2d 348, motion denied 85 S.Ct. 1528, 381 U.S. 908, 14 L.Ed.2d 431.

Doctrine that Supreme Court will decline to review state court judgments which rest on independent and adequate state grounds is necessary to avoid advisory opinions. Id.

If state court judgment rests upon two grounds, one of which is federal and the other nonfederal in character, United States Supreme Court does not have jurisdiction of appeal if nonfederal ground is independent of federal ground and adequate to support judgment. Jankovich v. Indiana Toll Road Commission, Inc. 1965, 85 S.Ct. 493, 379 U.S. 487, 13 L.Ed. 2d 439.

SEPARATION OF POWERS AND TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In answer to the Petitioner's contentions that the decision violated the Separation of Powers Doctrine and the Tenth Amendment to the Constitution of the United States, the doctrine of separated legislative, judicial

and executive powers is not an essential element of a republic form of government or of the limitations on the states contained in the Fourteenth Amendment, and their courts may mischievously misconstrue their own statutes without federal intervention. Dreyer v Illinois, 187 U.S. 71 83-84 (1902). This Court will not correct a state court's misconstruction of a local municipal annexation law to preserve the state legislature's plenary powers over municipal corporations and other political subdivisions from its judiciary even on the complaints of a human property owner that it must do so to preserve a republican form of government. Forsyth v. Hammond, 166 U.S. 506, 518-519 (1897).

Compare Gomillion v. Lightfoot, 364 U.S. 339 (1960) wherein this Court heard a case as to the limits of the city which had been drawn for the express purpose of eliminating negroes.

Smaller political entities cannot be heard to plead alleged rights of its voters, especially not as a limitation on a higher state authority, so as to retain them within local boundaries, for to allow it would be to slowly commit "sovereigntial suicide" by creating "states within the state." Pershing County v. Humboldt County, 43 Nev. 78, 871-88, 181 Pac. 960, 962, reh. den. 183 Pac. 314 (1919).

The power of the states over their political offspring is so pervasive that where found to be in accordance with Kentucky

law by the state court, this Court could find no Constitutional point upon which to disturb the decision sustaining Louisville's annexation of a Naval Ordnance installation. Howard v Commissioners, 344 U.S. 624 (1953). See also Wichita Falls v Bowen, 143 Tex. 45, 182 S.W.2d 695 (1944) (Sheppard Field); County of Norfolk v City of Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947) (Norfolk Navy Yard).

But, when a city of less than 4,000 decided to boost its population by 12,000 so as to obtain a larger share of tax revenues distributed on a per capita basis by means of annexing SAC headquarters and the major part of the free world's nuclear deferrent at Offut Air Force Base, in a state where the local court had four times earlier ruled annexations for revenue purposes only "invalid" a federal injunction may issue. United States v City of Bellevue, Nebraska, 334 F.Supp. 881 (D.C. Neb. 1971); aff'd 474 F.2d 473 (8th Cir. 1973); petition for cert. filed (U.S. May 26, 1973, No. 72-1591).

Such municipal imperialism is also "invalid" in Nevada, because the effect of annexation for taxation is to deprive property owners of their property without due process of law and thus it is unconstitutional and void. State ex rel Bibb v City of Reno, 64 Nev. 127, 118 P.2d 366 (1947).

An essential element of due process clauses, in whatever constitution found, being proper notice to those having rights to be affected, it is not startling that the statutory requisites of property owner

petitions for annexation are universally deemed to be jurisdictionally imperative, and the right of protest (even of the United States Air Force) "jealously guarded". States ex rel Quimby v City of Reno, 71 Nev. 144, 156-157, 282 P.2d 1071, 1077 (1955).

ARGUMENT RELATIVE TO THE FOURTEENTH AMENDMENT

In answer to the Petitioner's argument relative to the Fourteenth Amendment to the Constitution, Section 1, Respondent states:

To the 'innumerable" rulings that only the injured parties may complain of the violation of constitutional, or other, rights no special exception is granted to cities to allow them to urge the rights of their taxpayers to have them receive revenues. Hunter v Pittsburgh, 207 U.S. 161, 178-179 (1907). Nor will a group of its taxpayers actually present before the Court to be heard to argue that their city has a "right" to income protectable here. New Orleans v New Orleans Waterworks Co., 147 U.S. 79 (1891).

The Court will not yield in its deference to local law on a city's contention that diminution of its income by passage of a law has impaired its contractual obligations. Pawhuska v Pawhuska Oil & Gas Co., 250 U.S. 394 (1919).

Municipal corporations have no constitutional "right to revenue" for the courts

to protect. State ex rel Adams v Crawford, 99 Conn. 378, 121 Atl. 800 (1923); Re Heineman, 201 Wis. 484, 230 N.W. 698 (1930).

A few years later, taxpayers brought here for review a federal decision in favor of municipal bond creditors compelling them to continue paying taxes to an ousted city on the theory that the municipality had exercized "de facto" jurisdiction over their noncontiguous lands in which they had earlier acquiesced without protests, of taxes or otherwise, and thus were estopped. This Court, first stating that it was unquestionably bound to apply the local law gleaned from Florida statutes or decisions, rigidly adhered to the state cases, discovered that under them there could be no de jure annexation of noncontiguous lands under the statutes, and finding the annexation void, held that no amount of taxpayer consent could substitute for a statutory grant of power and reversed. Ocean Beach Heights, Inc., v Brown-Crummer Invest. Co., 302 U.S. 614 (1938).

Probably no better illustration of how extremely well settled the point is can be cited than the case of Smith v City of Winter Haven, 18 So.2d 4 (Fla. 1944) in which, although a federal judgment compelled the city to continue taxing a noncontiguous black neighborhood from which the state court had ousted it, the court reversed the trial judge's denial of an injunction.

The respondent taxpayers have no more quarrel with the principle that a court decision amounts to state action within the mean-

ing of the Fourteenth Amendment quoted by the Petitioner from 16 Am. Jur. 2d, than they do with the ruling in Monaco v. Mississippi, 292 U.S. 313 (1934) that the Eleventh Amendment prevents federal courts from entertaining actions brought by foreign principalities against states. But the protection of the Fourteenth Amendment is extended only to human beings and the private corporations in which they have property interests, and since the petitioner city did not produce in evidence before the trial or appellate court either its certificate of birth or naturalization, the co-equal judicial branch of its parental state government had every right to commit infanticide, devouring its offspring even without due process or equal protection of the laws.

In answer to the argument that the decision violated the Fifth Amendment to the United States Constitution, Petitioner re-adopts and incorporates those cases cited with the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

The Respondent, Clark County, contends the Petition for a Writ of Certiorari ought to be denied on the grounds that no federal questions were at any time raised in the proceedings below nor was there any federal question that was briefed in the proceedings below, and that a federal question was not necessary to the opinion as decided by the trial Court.

The law is clear that the boundaries of a municipality is within the sound discretion of the state government and does not involve any federal question.

The Respondent does not conceive any federal questions being raised under the Separation of Powers Doctrine nor under the Tenth Amendment to the Constitution.

The Respondent does not conceive any denial of equal protection because tax revenues may be denied to the Petitioner.

The Respondent does not conceive any violation of the one man, one vote principle nor any violation of the Fourteenth Amendment.

The Respondent does not conceive any rights or privileges guaranteed under the Fifth Amendment in the fact pattern herein.

It is further noted that this Court has never granted a Writ of Certiorari relative to the boundaries of a municipal corporation even where the boundaries were drawn boundaries because of racism.

To grant this petition would mean that this Court would have to find that it had the authority to review the judgment and opinion of the Supreme Court of the State of Nevada without there being

any federal question involved.

Respectfully submitted,

ROY A. WOOFTER
District Attorney

By Charles L. Garner
CHARLES L. GARNER
Chief Deputy

Attorney for Respondent,
CLARK COUNTY, NEVADA

PROOF OF SERVICE

STATE OF NEVADA)
ss:
COUNTY OF CLARK)

CHARLES L. GARNER, being first duly sworn, deposes and says:

That on the 12th day of September, 1973, I mailed three copies of the foregoing Brief in Opposition to Petition to Writ of Certiorari to:

WILLIAM S. BARKER
514 South Third Street
Las Vegas, Nevada 89101
Counsel for Petitioner

HARRY J. MANGRUM, JR.
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Counsel for Respondent
Sunrise Manor Protective
Association

. . . . . .

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Further, that postage was fully prepaid, and that there is regular communication by the United States mails between the place of posting and the place so addressed.

Charles L Garner
CHARLES L. GARNER

Subscribed and sworn to before me this 12th day of September, 1973.

Nancy L. Carson
Notary Public.

NANCY L. CARSON
Notary Public—State of Nevada
COUNTY OF CLARK
My Commission Expires Oct. 22, 1976